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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 552

ASSOCIATED THIRD CLASS MAIL USERS, INC. and SPENCER GIFTS, INC., *Petitioners*

v.

UNITED STATES OF AMERICA and ARTHUR E. SUMMERFIELD, Postmaster General of the United States, *Respondents*

PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Associated Third Class Mail Users, Inc., and Spencer Gifts, Inc., respectfully pray that a Writ of Certiorari issue to review a Decision (App. p. 2a) of the United States Court of Appeals for the District of Columbia Circuit, entered August 2, 1957, upholding a decision of the United States District Court for the District of Columbia, entered on the 18th day of

April, 1957, which dismissed the complaint of the petitioners herein for a declaratory judgment and other relief.

CITATIONS TO THE OPINIONS BELOW

The United States District Court for the District of Columbia in its case known as Civil Action 893-57, signed an order on April 18, 1957, which is not reported in printed volumes, dismissing the complaint of the petitioners. (App. p. 1a)

The United States Court of Appeals for the District of Columbia Circuit in an order dated August 2, 1957, and in its case Number 13929, not reported in printed volumes, affirmed the order of the United States District Court for the District of Columbia. (App. p. 2a)

JURISDICTION

The order of the Court of Appeals was entered on August 2, 1957. Petitioners timely filed an application for stay of said order. The Court of Appeals stayed to October 15, 1957 its opinion and judgment pending application to this Court for certiorari. The jurisdiction of this Honorable Court is invoked under 28 USC, Section 1254 and 2101.

STATEMENT OF QUESTIONS PRESENTED

Where a complaint for a declaratory Judgment and other relief involving the interpretation of a statute of the United States [redacted], can the United States District Court consider an oral motion for dismissal as a preliminary matter, without a written motion being filed; no opportunity being given to plaintiffs to respond thereto; and enter a judgment dismissing the

complaint with prejudice, considering the fact that no written motion, notice, or opportunity to reply was given.

Where a complaint was filed asking for relief in the nature of declaratory judgment and other relief, based on rights alleged to be acquired under the statutes of the United States, can the Court rule that the entire action is moot by the mere submission of a departmental order of the Postmaster General of the United States without giving the plaintiffs the opportunity to be fully heard in connection with the dismissal.

STATUTES, REGULATIONS AND RULES INVOLVED

Statutes

5 United States Code 369 (1946 Ed., Ch. 6)

Duties of Postmaster General.

It shall be the duty of the Postmaster General:

* * * Ninth. To superintend generally the business of the department and execute all laws relative to the Postal Service. (R. S. sec. 396; June 10, 1921, ch. 18, secs. 304, 309, 42 Stat. 24, 25.)

28 U. S. Code, Section 2201,

CREATION OF REMEDY.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of

a final judgment or decree and shall be reviewable as such. (June 25, 1948, ch. 646, 1, 62 Stat. 964, amended May 24, 1949, ch, 139, 111, 64 Stat. 105.)

28 United States Code, Section 2202,

FURTHER RELIEF.

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment. (June 25, 1948, ch. 646, 1, 62 Stat. 964, eff. Sept. 1, 1948)

39 United States Code 6 (Making up mail.)

All letters brought to any post office half an hour before the time for the departure of the mail shall be forwarded therein; but at offices where, in the opinion of the Postmaster General, more time for making up the mail is required, he may prescribe accordingly, not exceeding one hour. (R.S. sec. 3840). Derivation: Act June 8, 1872, ch. 335, Sec. 69, 17 Stat. 293

39 United States Code 235

Mail matter of the third class shall include books, circulars, and other matter wholly in print (except newspapers and other periodicals entered as second class matter), proof sheets, corrected proof sheets, and manuscript copy accompanying same, merchandise (including farm and factory products) and all other mailable matter not included in the first or second class, or in the fourth class as defined in section 240 of this title, but bills or statements of account produced by any photographic or mechanical process shall not be accepted as mail matter of the third class unless

presented in quantities of twenty or more identical copies. When such bills or statements are not identical or are presented in quantities of less than twenty identical copies, they shall be subject to postage at the first-class rate. (Feb. 28, 1925, ch. 368, sec. 206, 43 Stat. 1067; Apr. 27, 193, ch. 141, 50 Stat. 119).

39 United States Code 236. Same; circular defined.

The term "circular" is defined to be a printed letter, which, according to internal evidence, is being sent in identical terms to several persons. A circular shall not lose its character as such, when the date and the name of the addressed and of the sender shall be typewritten therein, nor by the correction of mere typographical errors in writing. (Mar. 3, 1879, ch. 180, sec. 18, 20 Stat. 360).

39 United States Code 237, Same: printed matter defined.

"Printed matter" is defined to be the reproduction upon paper, by any process except that of handwriting, of any words, letters, characters, figures, or images, or of any combination thereof, not having the character of an actual and personal correspondence. (Mar. 3, 1879, ch. 180, sec. 19, 20 Stat. 360).

39 United States Code, 290a-1

Third-class matter; rate of postage.

The rate of postage on third-class matter shall be 2 cents for the first two ounces or fraction thereof, and one cent for each additional ounce or fraction thereof up to and including eight ounces in weight, except that the rate of postage on books and catalogs, of twenty-

four pages or more, seeds, cuttings, bulbs, roots, scions, and plants not exceeding eight ounces in weight shall be 2 cents for the first two ounces or fraction thereof and 1½ cents for each additional two ounces or fraction thereof: Provided, That upon payment of a fee of $10 for each calendar year or portion thereof and under such regulations as the Postmaster General may establish for the collection of the lawful revenue and for facilitating the handling of such matter in the mails, it shall be lawful to accept for transmission in the mails, separately addressed identical pieces of third-class matter in quantities of not less than 20 pounds, or of not less than 200 pieces, subject to pound rates of postage applicable to the entire bulk mailed at one time: Provided Further, That the rate of postage on third-class matter mailed in bulk under the foregoing provision shall be 14¢ for each pound or fraction thereof with a minimum charge per piece of one cent, except that in the case of books and catalogs of twenty-four pages or more, seeds, cuttings, bulbs, roots, scions, and plants the rate shall be 10¢ for each pound or fraction thereof with a minimum charge per piece of one cent: Provided Further, That the minimum charge per piece of one cent specified in the foregoing proviso shall be increased to 1½¢ on July 1, 1952: Provided Further, That pieces or packages of such size or form as to prevent ready facing and tying in bundles and requiring individual distributing throughout shall be subject to a minimum charge of 3¢ each: And Provided Further, That the rates prescribed by this section shall not apply with respect to matter mailed by religious, educational, scientific, philanthropic, agricultural, labor, Veterans', or fraternal organizations or associations, not organized for profit, and none of the net income of which inures to the benefit of any private

stockholder or individual, and the existing rates shall continue to apply with respect to such matter. (Oct. 30, 1951, ch. 631, title I, 3, 65 Stat. 673).

Rules

RULE 7a, FEDERAL RULES OF CIVIL PROCEDURE:

Pleadings. There shall be a complaint and an answer; and there shall be a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

RULE 7b, FEDERAL RULES OF CIVIL PROCEDURE:

Motions and Other Papers.

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

RULE 7c, FEDERAL RULES OF CIVIL PROCEDURE

Demurrers, Pleas, Etc., Abolished. Demurrers, pleas, and exceptions for insufficiency of a pleading

shall not be used. As amended 1947, eff. March 19, 1948.

RULE 12b, FEDERAL RULES OF CIVIL PROCEDURE

"How Presented.

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

RULE 12d, FEDERAL RULES OF CIVIL PROCEDURE

Preliminary Hearings.

The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

RULE 56a, FEDERAL RULES OF CIVIL PROCEDURE

Summary Judgment

For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for a summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

RULE 56b, FEDERAL RULES OF CIVIL PROCEDURE

For Defending Party. A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

RULE 56c, FEDERAL RULES OF CIVIL PROCEDURE

Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment

sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone though there is a genuine issue as to the amount of damages.

RULE 57, FEDERAL RULES OF CIVIL PROCEDURE

Declaratory Judgments.

The procedure for obtaining a declaratory judgment pursuant to Title 28, U. S. C., 2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar. As amended Dec. 29, 1948, effective October 20, 1949.

RULE 9b, Local Civil Rules, United States District Court for the District of Columbia

POINTS AND AUTHORITIES; ENTRY OF MOTION, ETC.; FAILURE TO FILE OPPOSING POINTS AND AUTHORITIES; ORAL HEARINGS.

With each motion there shall be filed and served a separate paper stating the specific points of law and authorities to support the motion. Such statement shall be additional to a statement of grounds in the motion itself, and shall be entered on the docket but

shall not be a part of the record. The moving party shall enter the motion and the fact of filing the statement on a card provided by the clerk. A statement of opposing points and authorities shall be similarly filed, noted and served within five days or such further time as the court may grant or the parties agree upon. If not filed within the prescribed time the court may treat the motion as conceded. If so filed the motion shall be treated as submitted unless the judge directs or either party requests an oral hearing, for which ten minutes will be allowed each side.

RULE 9e, Local Civil Rules, United States District Court for the District of Columbia

ORAL HEARING; NOTICE OF. If an oral hearing is to be had the clerk shall give at least two days notice by telephone or otherwise to the offices of attorneys and to the address of record of any party appearing in proper person.

RULE 9f, Local Civil Rules, United States District Court for the District of Columbia

ORAL HEARING; WHEN NOT ALLOWED. An oral hearing will not be allowed, unless directed by the court, upon a motion to rehear, or to vacate, stay or modify an order or judgment or for a new trial, or for any order after trial relating to a verdict, judgment, findings of fact or conclusions of law.

STATEMENT OF THE CASE

This case presents for correction errors of the United States District Court for the District of Columbia which were erroneously affirmed by the United States Court of Appeals for the District of Columbia Circuit

(App. pp. 1a, 2a). The case is one of importance. It involves questions dealing with the rights of litigants as granted by the Federal Rules of Civil Procedure in Rules 7a, 7b, 12d, 56(a) (b) and, 57 and as implemented by the local Civil Rules of the United States District Court for the District of Columbia, Rule 9b (e)(f). It also involves the interpretation of the following sections of the United States Code, namely, 5 United States Code, 369; 28 United States Code 2201; 28 United States Code, 2202; 39 United States Code, 6; 39 United States Code 235; 39 United States Code 236; 39 United States Code 237; 39 United States Code 290a-1. (Infra, pp. 3 to 11)

The petitioner, Associated Third Class Mail Users, Inc., a District of Columbia corporation, is composed of approximately 600 members who are engaged in selling and merchandising their goods and services by extensive use of third class mail handled by the United States Post Office Department. The members are located in almost all states of the United States and the District of Columbia, and they account for at least $10,000,000.00 in expenditures per year for third class postage. The members of the association are holders of permits under Title 39, Section 290a-1 of the United States Code (infra, p. 5) which section defines the third class category of mail, its rates, and the necessity for permits.

The petitioner Spencer Gifts, Inc., is a mail order company organized and existing under the laws of the State of New Jersey and is engaged in the selling by mail of gifts, housewares, toys and other merchandise to customers all over the United States. This petitioner is the holder of Bulk mail permit No. Atlantic City 1023, issued in accordance with the provisions of

Title 39, Section 290a-1, United States Code (infra, p. 5) and, as required by statute, said appellant has paid for its permit for the year 1957.

On April 5, 1957, the respondent, Arthur E. Summerfield, Postmaster General of the United States, acting in his official capacity as such, and on behalf of the United States, issued an order, Number 56314. (R. p. 12) In paragraph numbered 3 of the aforementioned order the Postmaster General directed all Postmasters in the United States as follows:

> "3. No third class mail, except certain medical items, will be accepted effective April 29, 1957."

This order resulted in immediate loss and damage to the petitioners since it disrupted their operation and prevented them from making their normal business plans.

On April 11, 1957, petitioners herein filed their complaint against the respondents asking for relief in the nature of Mandamus and/or Declaratory Judgment and Injunctive Relief and/or a proceeding in the nature of Quo Warranto challenging the authority of the Postmaster General of the United States to place an embargo on third class mail and/or for Injunctive Relief for anticipatory breach of contract, based on the fact that under the laws of the United States the Postmaster General had no right to issue an order embargoing third class mail and for the further reason that the petitioners' contractual rights were violated by virtue of their holding and owning valid permits to make third class mailings.

Along with the complaint filed there also was filed a motion by the petitioners for an order to compel respondents Arthur E. Summerfield and the United

States of America to accept and deliver third class mail to addresses of said petitioners, pendente lite. (R. p. 13) Said motion was accompanied by a notice and was supported by points and authorities and the affidavits of Harry J. Maginnis and Max Adler, President of Spencer Gifts, Inc. (R. pp. 15 to 18)

On April 16, 1957, telephone arrangements were made with the office of the United States Attorney, attorney for respondents, to appear in the United States District Court for the District of Columbia on April 17, 1957, and to take up as a preliminary matter the availability of obtaining a date for hearing on the motion. On April 17, 1957, petitioners' attorneys and a representative of the United States Attorney's office appeared in the United States District Court for the District of Columbia, Motions Court, and petitioners' attorneys were advised that Postmaster General of the United States had issued an order numbered 56324 (R. p. 20) which, among other actions, revoked paragraph number 3 of Order Number 56314 of the Postmaster General of the United States. Thereupon petitioners' attorneys advised the representative of the United States Attorney's Office that they would withdraw the motion for pendente lite relief.

When court convened, respondents' attorney, without any written motion and as a preliminary matter, moved the court to dismiss the entire case as moot. No written motion had been filed, no points and authorities had been submitted, and the appellants were not given an opportunity to fully present an opposition as required by the Federal Rules of Civil Procedure and the local Civil Rules.

The court granted the oral motion and on April 18, 1957, entered a final order dismissing the entire cause with prejudice. (R. p. 19)

As a consequence an appeal from said order was filed in the United States Court of Appeals for the District of Columbia Circuit. After the briefs of the petitioners were submitted to said Court respondents filed a motion to dismiss. Opposition was filed to said motion by petitioners and the United States Court of Appeals, in Chambers, affirmed the action of the United States District Court for the District of Columbia. (App. 2a)

From this action this petition was taken.

REASONS FOR GRANTING THE WRIT

There are here presented two important questions of Federal Law which have not been and should be settled by this Court.

The first requires that this Court interpret the meaning of Rules 7a, 7b, and 7c of the Federal Rules of Civil Procedure concerning whether or not, at a hearing on a preliminary matter entirely unconnected with a motion to dismiss, must a motion to dismiss be in writing and set forth the grounds therefor as appears to be required by said rules. In conjunction with the interpretation of the foregoing rules as set forth, consideration must also be given to the meaning of Rules 9b and 12a of the Federal Rules of Civil Procedure which deal with the subject of motions and the methods of presentation of them.

The second reason for granting the writ concerns the necessity of interpretation of Section 2201 and 2202 of the United States Code, Title 28, involving the right to obtain a declaratory judgment where the party seeking the relief is entitled to uninterrupted use of the United States mails as provided by 39 United States

Code, Section 6 and related statutes on the mails referred to herein, (Infra pp. 3 to 7) where there is an imminent danger of the respondents acting unlawfully and stopping the complainants from using the mails in contravention of the rights granted by the statutes of the United States.

I.

The Court Below Did Not Correctly Interpret the Federal Rules of Civil Procedure, in That It Did Not Require That the Motion to Dismiss the Complaint be in Writing, Served Upon the Party to Whom the Motion Is Directed, With Notice and an Opportunity for the Party to Reply. Further, That the Court Below Should Have Heard Said Motion in Open Court With Both Parties Being Given an Opportunity to Present Arguments; and That the Court Below Incorrectly Entertained an Oral Motion to Dismiss as a Preliminary Matter in Contravention of the Rules of Federal Rules of Civil Procedure.

At the time the action was taken by the Court below granting the respondents' motion to dismiss the parties were not before the Court pursuant to any notice of hearing. See Statement of the Case. (Infra, p. 11) As is indicated, counsel for petitioners was present to request the Court as a preliminary matter to set a day certain for a hearing on the motion filed by respondents herein for preliminary relief. (R. pp. 11 to 15) There was no knowledge or consent on the part of the petitioners to take up any other matter with the Court at that time. From the record of the proceedings had, it is indicated that there was no consent by petitioners to the action of the court in considering any motion to dismiss the entire cause. (R. pp. 2 to 4)

Rule 7a, Rule 7b, and Rule 7c of the Federal Rules of Civil Procedure state with particularity the plead-

ings that are allowed in a case and Rule 7b deals particularly with motions. It states in subsection (1)

> "An application to the Court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion."

The motion made by the respondents did not meet the requirement that it be in writing and consequently did not state grounds therefor and there was no written notice as required by the above rule. See *Advertisers Exchange* v. *Bayless Drug Store*, D.C.N.J., 3 FRD 178; *Steingulf* v. *National City Bank of New York*, D.C.-N.Y. 1941, 36 F. Supp. 486; *In re J. & M. Doyle Co.*, C.C.A. 3d, 1942, 130 F. 2d 340.

In *Hammond Knowlton* v. *Hartford-Conn. Trust Company*, D.C. Conn. 1939, found in 26 F. Supp. 292, the Court discussed the requirement of a motion being in writing.

It had to say,

> "Any other construction of the Rule would lead to chaos in motion procedure. A party, for instance, might make a motion on notice, for the inspection of a document, and in the hearing thereof, and without any notice whatsoever, include a further motion to punish somebody for contempt of court."

See also *Raitt* v. *Seltzer*, D.C.N.Y. 1950, 10 F.R.D. 48.

Rule 7b(2) states,

> "The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules."

Of course, there being no written motion the requirements of this section of Rule 7 were not complied with.

Although it appears improbable that the Court could do anything but sustain the position of these petitioners based on the foregoing violation of Rule 7b it might be well to discuss the other significant Federal Rules of Civil Procedure which might possibly enter into a consideration of the advisability of allowing the motion to dismiss to be made in the manner it was in this case.

Rule 12a states, inter alia, as follows:

> "Every defense, in law of fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party-claim shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) Lack of jurisdiction over the subject matter, (2) Lack of jurisdiction over the person, (3) Improper venue, (4) Insufficiency of process, (5) Insufficiency of service of process, (6) Failure to state a claim upon which relief can be granted, (7) Failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. * * *"

Further on, the same rule states

> "* * *. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 and all parties shall be given reasonable oportunity to present all material made pertinent in such a motion by Rule 56."

Assuming for the purposes of this argument that the court possibly was considering this motion as one under subsections (6) of Rule 12a it is very plain that since the basis for the action of the court was the order of the Postmaster General of the United States dated April 16, 1957 (R. p. 20) that this document is certainly a matter outside of the pleadings. The only pleadings filed were the complaint of the appellants, the prior order of the Postmaster General of the United States attached thereto, affidavits of Harry J. Maginnis and Max Adler, a motion for pendente lite relief, the notice of motion and points and authorities. (R. pp. 5 to 18) It is clear that if the court was treating the motion by respondents as one for summary judgment, that under Rule 12a the petitioners should have been given reasonable opportunity to present all material pertinent to such a motion.

Progressing to a consideration of Rule 56 of the Federal Rules of Civil Procedure, it appears that an examination of the entire text of 56a, 56b and 56c (infra, pp. 9 to 10) and particularly in (c) that there is a definite contemplation that said motion be in writing since it requires that a motion shall be served at least ten days before the time fixed for the hearing. Also that the adverse party prior to the day of hearing may serve opposing affidavits. It certainly can further be assumed that a motion of this type should be set in a regular manner for hearing in accordance with the practice of the United States District Court.

Examination of the Local Civil Rules of the United States District Court for the District of Columbia certainly indicates, without question, the procedure with regard to motions made in a cause.

Rule 9b of the Local Civil Rules (infra, p. 10) states, inter alia,

> "With each motion there shall be filed and served a separate paper stating the specific points of law and authorities to support the motion. Such statements shall be additional to a statement of grounds in the motion itself, and shall be entered on the docket but shall not be a part of the record. The moving party shall enter the motion and the fact of filing the statement on a card provided by the Clerk. A statement of opposing points and authorities shall be similarly filed, noted and served within five days or such further time as the court may grant or the parties agree upon. If not filed within a prescribed time the court may treat the motion as conceded. If so filed the motion shall be treated as submitted unless the judge directs or either party requests an oral hearing, for which ten minutes will be allowed each side."

In the present case there were no points and authorities submitted, no compliance with the provision of filing a statement on a card provided by the Clerk, no opportunity to file a statement of opposing points and authorities, and no notice of any kind. Further, there was no opportunity for petitioners to request an oral hearing.

Rule 9e of the Local Civil Rules (infra, p. 11) requires that the clerk shall give at least two days notice by telephone to the parties. No such notice was ever given.

It is very apparent that in the instant case there was a flagrant disregard of the requirements of the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the District of Columbia. Under these circumstances it is inescapable that

this matter must be reversed and returned to the lower court for appropriate proceedings.

II.

That the Complaint in the Nature of Mandamus and/or Declaratory Judgment and Injunctive Relief and/or a Proceeding in the Nature of Quo Warranto Challenging the Authority of the Postmaster General of the United States to Perform Certain Acts and/or for Injunctive Relief for Anticipatory Breach of Contract Set Forth a Cause of Action Which Was Not Rendered Moot by an Order of the Postmaster General of the United States, Dated April 17, 1957, and the Plaintiffs are Entitled to a Hearing on the Merits.

In the verified complaint filed herein the petitioners have shown that the action of the Postmaster General of the United States of April 5, 1957 (Order of Postmaster General Number 56314) disrupted their business and caused irreparable loss and damage. (R. pp. 5 to 11) It indicates that the type of business using third class mail is planned far ahead. Printed material, paper, advertising formats, envelopes and supplies to be used for the third class media must be purchased far in advance of mailing dates. Even though the Postmaster General of the United States by his order Number 56324 dated April 16, 1957 (R. p. 20), rescinded his action in embargoing third class mail the petitioners suffered damage and injury.

Careful examination of the pertinent statutes of the United States regarding the right of the Postmaster General to suspend any class or classes of mail shows that the right does not exist.

Under Section 8, Article 1, Clause 7 of the Constitution of the United States, the Congress is given the power to control the mail. (Infra, p. 22)

For better understanding of the basis of the complaint for relief herein it might be well to define in common, everyday language, just exactly what constitutes third class mail and its significance to the appellants and to the public.

Third class mail consists mainly of advertising literature or packages under eight ounces. A special rate is provided for "bulk mail", where the mailer, acting under regulations issued by the Postmaster General, sorts, ties, sacks and delivers this third class mail to the Post Office. The payment of a $10 fee is required by statute to enjoy the bulk privilege. Individual pieces of third class mail has a slightly higher rate and may be placed in corner mailboxes. Over one billion Christmas cards are sent annually at the third class rate. Municipalities and states use third class mail to send tax invoices, election literature, etc. Patriotic, charitable and other societies are prominent holders of third class permits. Certain newspapers are sent under third class rates. 39 United States Code 290a-1. (Infra p. 5)

To trace the history of legislation on mail in general, the postal service, and third class mail in particular, it should be pointed out that its foundation was laid in Article 1, Section 8, of the Constitution of the United States, Clause 7, which states as follows:

> "The Congress shall have power * * * to establish post offices and post roads;".

This Court held in *ex parte Jackson*, 96 U.S. 727, 732 (1878) that the postal power given under the constitution to Congress embraces all measures necessary to insurance the safe and speedy transit and prompt delivery of the mails. It has further held that any-

thing done in connection with the mails is under the protection of the National Government and is in contemplation of its law of property. In addition that the National Government can come into court and remand an injunction against anyone who interfered with the Interstate Commerce and the transmission of the mails. See *Scaright* v. *Stokes*, 3 Howard, 151, 169 (1845). Also *Re Debs*, 158 U.S. 564, 599 (1895).

By an act of Congress March 3, 1863, 12 Stat. 765, mail was divided into three classes and this statute created the third class of mail. This Act stated:

> "Third class embraces all other matter which is or may hereafter be by law declared mailable; embracing all pamphlets, occasional publications, books, book manuscripts, proof sheets, whether corrected or not, maps, prints, engravings, blanks, flexible patterns, samples and sample cards, photographic paper, letter envelopes, postal envelopes, or wrappers, cards, paper, plain or ornamental, photographic representations of different types, seeds, cuttings, bulbs, roots and scions."

The above legislation resulted from the enactment of S. 492,[1] 37th Congress, third session, a bill to amend

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[1] The legislative action on S. 492 was published in the Congressional Globe for the 37th Congress, third session, as follows:

"S. 492, to amend the laws relating to the Post Department, was introduced by Mr. Collamer, on January 28, 1863, and referred to the Committee on Post Office and Post Roads, page 558.

Reported without amendment (report not printed), p. 750.
Debated in the Senate and passed, pages 837-840.
Debated in House, pages 1011, 1149-1151, 1167-1170.
Passed House, page 1170.

(Continued on Page 24)

the laws relating to the Post Office Department. The bill was introduced on January 28, 1863, by Senator Jacob Collamer from Vermont at the request of the Postmaster General Jim Blair.

An examination of all of this material does not reveal any discussion or reason for establishing third class mail. There were no printed reports or hearings pertaining to this legislation.

The three categories of mail as outlined in the Act of March 3, 1863 (12 Stat. 765) maintained until an act was passed March 10, 1879 (20 Stat. 358-361), repealing all former laws relating to the classification of mail matter and rates of postage and divided mail matter into four classes.

This particular act defined third class mail and established the rates as follows:

> "Mail matter of the third class shall embrace books, transient newspapers, and periodicals, circulars and other matter wholly in print, proof sheets, corrected proof sheets, and manuscript copy accompanying the same, postage shall be paid at the rate of one cent for each two ounces or fractional part thereof and shall fully be prepaid by postage stamps affixed to said matter."

This legislation resulted from the enactment of HR 6143, 45th Congress, Third Session, making appropria-

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(Continued from Page 23)

House asks concurrence of amendment, page 1178.
Senate disagrees to House amendment and asks for a conference, pages 1181, 1225.
House agrees to conference, pages 1235, 1343.
Conference report submitted in Senate and agreed to, page 1371.
Conference report submitted in House and agreed to, page 1394.

tions for the services of the Post Office Department for fiscal year 1880. There is extensive legislative action[2] in this appropriations act but the only significant comments on third class mail were made by Representative Baker of Indiana, and appear on pages 801 and 802 of the Congressional Record, Volume 8, as follows:

"Now, Congress has greatly enlarged the amount of mail matter of the third class, and the result will be that a very large proportion of the packages weighing a pound and under, which have heretofore been transported by express companies, will now be sent by mail. My judgment is that it will require an increase of not less than $100,000 to meet the wants of this service. I have a carefully

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[2] Reported by Mr. Blount, of Georgia, from the Committee on Appropriations, page 667.

Amendments submitted and referred, pages 698, 754, 834.
Considered, amended, and passed House, pages 738-749, 801-805, 818-824, 850, 851.
Received by the Senate, page 863.
Referred to the Senate Committee on Appropriations, page 864.
Reported back with amendments, pages 948, 1073, 1162.
Considered, amended, and passed by the Senate, pages 1527, 1575-1593, 1629-1638, 1639-1667.
Referred to the House Committee on Appropriations, page 1893.
Reported back and amendments considered, pages 2110-2138.
Certain amendments agreed to by the House, page 2144.
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First committee of conference unable to agree, and further conference ordered, pages 2212, 2282.
Second conference report concurred in by the House, pages 2372, 2373.
Considered and non-concurred in by the Senate; further conference requested, pages 2313-2317, 2384.
Third conference report concurred in, pages 2323, 2386.
Examined and signed, pages 2340, 2400.
Approved by the President, page 2409.

prepared letter, written to me since this bill was reported to the House, prepared in the office of the Second Assistant Postmaster-General, giving the reasons why this is necessary, and I will ask to have read the portions I have marked. * * *."

Further, Mr. Baker said,

"It is everything, from a pair of boots and shoes up to a horseshoe, that is now transported through the mails, and so long as the Post Office Department is required to transport this matter it is important that Congress shall vote money essential to the service."

In 1925, all matter not in the first and second classes weighing eight ounces or less was placed in the third class and that weighing over eight ounces in the fourth class. In the same year, catalogs not weighing over eight ounces were given a special third class rate.

In 1928 a special bulk rate was made applicable to separately addressed identical pieces of third class matter mailed at one time in quantities of at least 20 pounds or 200 pieces. For the first time the facing and separation by states, cities, etc. was required of the mailer.

Since that time certain changes have been made in rates for the various classifications but no significant changes have been made of the types of mail.

The Post Office Department, speaking about United States Domestic Postage rates, 1789-1956 in Post Office Department Publication 15, 1956, Page 10, states:

"By far the largest users of third-class mail are advertisers. Reflecting the overall increase in national advertising, the volume of advertising matter sent through the mail has increased sharply over the years. In fiscal 1955 the Department

handled over 15 billion pieces of third-class mail. *The impact of these mailings on sales of goods and services in the United States is incalculable, but their influence probably amounts to billions of dollars each year.*" (Italics supplied)

In addition to this legislation it appears that the Congress of the United States in 39 United States Code, Section 6 (infra p. 4) has legislated with reference to the duty of the Postmaster General and the Post Office Department with reference to all mail matter. This section states,

> "All letters brought to any Post Office half an hour before the time of departure of the mails shall be forwarded therein; that at offices where, in the opinion of the Postmaster General, more time for making up the mail as required, he may prescribe accordingly, not exceeding one hour." (Infra p. 4)

This section makes a definite requirement on the Postmaster General of the United States to handle all mail, including the third class.

From this legislation it is clear third class mail is included as mail matter under 39 United States Code Section 6 (infra, p. 4) and that it is required to be handled by the Postmaster General.

What is the right or duty of the Postmaster General of the United States in connection with the mail service? Title 5, Section 369, United States Code (infra p. 3) states, inter alia,

> "It shall be the duty of the Postmaster General: * * * Ninth: To superintend generally the business of the Department and execute all laws relative to the Postal Service." (R. S. Sec. 396; June 10, 1921, chapter 18, Secs. 304, 309, 42 Stat. 24, 25.)

Other than this statute there is nothing to be found in the laws of the United States regarding the authority of the Postmaster General to suspend mail service. From the language employed it is clear that once the Congress has legislated relating to any particular part of the postal service it is the ministerial duty of the Postmaster General to carry the law into effect. Examination of the statutes regarding third class mail does not reveal that the Postmaster General has any discretion in determining whether or not he can or should accept and deliver this class of mail. His duty is well defined and any attempt on his part to avoid this duty is subject to judicial relief to require him to perform under the statutes.

Petitioners herein have filed a verified complaint showing that they have fully complied with the requirement of Title 39, United States Code, Section 290a-1 for the use of the third class mail privilege by obtaining the necessary permit for a fee of $10.00. (Infra p. 5) Spencer Gifts, Inc. has shown that it is the holder of Atlantic City, New Jersey Permit Number 1023 for the calendar year 1957. It has therefore complied with the requirements of this section of the United States Code and is entitled to the use of third class bulk-mail privilege throughout the calendar year 1957 without interference on the part of the Post Office Department of the United States of America. Since petitioners have complied with all the requirements of said statute they have a vested contractual interest. There is nothing to indicate that they have in any way breached the requirements of the United States Code concerning use of the mails.

Examination of the statute creating the right to ask for declaratory relief reveals that in any case of actual

controversy except with respect to federal taxes, the Courts of the United States may declare the rights and other legal relations of any interested party seeking such declaration. 28 U.S. Code, Sec. 2201. (Infra p. 3)

The Postmaster General has already received his appropriation for the fiscal year 1958 which begins July 1, 1957, and ends June 30, 1958, and has stated that said appropriation is not sufficient, has asked for an increase in said appropriation; and has warned that a new curtailment of services may be expected in said fiscal year which begins July 1, 1957.

Deputy Postmaster General Maurice H. Stans testifying before the Senate Appropriations Subcommittee on May 8, 1957, concerning an insufficient appropriation for the fiscal year 1958, stated that the Post Office Department needed a $58-million appropriation to satisfy the Department's original request (reduced by the House of Representatives) and an additional $70 million to $90 million for the operation of the Department based on newly arrived at data not available when the original request was made. He advised the Subcommittee that the Department would have no alternative but to curtail services July 1, 1957 unless the request of the Post Office Department for additional funds were granted. (See Hearings before the Subcommittee of the Committee on Appropriations, U. S. Senate, 85th Congress, first Session, on May 8, p. 4.) The Postmaster General testified at a later hearing that an embargo would be placed on third class mail from December 1st to December 25th, 1957, unless the Congress appropriated the entire supplemental monies requested by the Post Office Department.

As has been shown, petitioners have a vested interest and substantial investment in matter requiring the use of the third class mail. It is an industry based on the use of the mail. From the text of the order Number 56314 of the Postmaster General of the United States, dated April 5, 1957 (R. p. 12), it is apparent that the Postmaster General placed his embargo on the use of third class mail simply because there was a shortage of money appropriated by Congress for the general operation of the Post Office Department. Again, the Post Office Department is faced with a shortage of appropriation for the fiscal year 1958 which began July 1, 1957. (Infra, p. 29) All indications point to a new curtailment of postal service during the new appropriation year. It is a reasonable assumption to make, that this curtailment again will involve the refusal to accept third class mail by the Post Office Department. The lack of appropriation in no way affects the service required to be performed to citizens by the Postal Service considering the statutory requirements. So long as the users of the mail pay the required postage and comply with the statutory requirements they are entitled to all services as set forth in the United States Code.

Many cases have held that the Declaratory Judgment Act must be liberally construed to attain its objective, which is to expedite, and simplify the ascertainment of certain rights. See *Aralac, Inc.* v. *Hat Corporation of America*, CCA 3rd, 1948, 166 F. (2d) 286. Also *Oil Workers International Union, Local Number 463* v. *Texoma Natural Gas Company*, CCA 5th, 1945, 146 F. (2d) 62, Certiorari denied, 65 S. Ct. 1017, 324 U.S. 872, 89 L. Ed. 1426, Re-hearing denied 65 S. Ct. 1183, 325 U. S. 893, 89 L. Ed. 2004; *Ohio Casualty Insurance*

Company v. *Marr*, CCA 10th, 1938, 98 F. (2d) 973, Certiorari denied 59 S. Ct. 245, 305 U. S. 652, 83 L. Ed. 422, Re-hearing denied 59 S. Ct. 251, 305 U. S. 675, 83 L. Ed. 437; *Aetna Casualty and Surety Company* v. *Quarles*, CCA 4th, 1937, 92 F. (2d) 321.

In *Maryland Casualty Company* v. *Boyle Construction Company*, CCA 4th, 1941, 123 F. 2d 558, 565, Judge Parker stated the principal considerations in granting declaratory relief to be:

> " * * * The two principal criteria governing the policy in favor of rendering declaratory judgment are (1) That a judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. * * * "

Certainly the position of the petitioners herein is that involving uncertainty, insecurity and controversy, and a judgment declaring that the Postmaster General of the United States must, under the statutes of the United States, accept and deliver third class mail, will clarify and settle the legal relations, dates and rights of the parties.

It has been held in a number of cases that the party bringing action for declaratory relief must have a real and proximate interest to be protected. By the action of the Postmaster General of April 5, 1957 (R. p. 12), in violation of his statutory duties in suspending and in ordering the future suspension of third class mail, substantial actual damage was caused to the petitioner Spencer Gifts, Inc. Prospective identical action by the Postmaster General creates a present and real dilemma or danger to the petitioners.

If the petitioners have the right as they contend that they do, to the uninterfered with use of the third class mail for the operation of their business, they are entitled to a judgment declaring that the Post Office Department of the United States must accept and deliver third class mail under the statutes. See *Maryland Casualty Company* v. *Hubbard*, D. C. Cal. 1938, 22 F. Supp. 697; *Ohio Casualty Insurance Company* v. *Marr*, D. C. Okla. 1938, 21 F. Supp. 217, affirmed 98 F. 2d 973, Certiorari denied 59 S. Ct. 245, 305 U. S. 652, 83 L. Ed. 422, re-hearing denied 59 S. Ct. 251, 305 U. S. 675, 33 L. Ed. 437; *American Motorists Insurance Company* v. *Busch*, D. C. Cal. 1938, 22 F. Supp. 72.

In an analogous situation Courts have held in connection with an action on patents that a declaratory judgment action may be maintained to determine the validity of a patent for a patentee where there is a threat of infringement action even though no infringement notices have been sent to others in the trade since the position of insecurity for the alleged infringer exists. See *Lances* v. *Letz*, CCA 2nd 1941, 115 F. 2d 916.

It has been held that declaratory relief should be granted where it will serve a useful purpose in clarifying and settling legal relations and will terminate and afford relief from uncertainty, insecurity, and controversy. *Aetna Casualty & Surety Company* v. *Quarles*, CCA 4th, 1937, 92 F. 2d 321.

A determination of declaratory relief by the Court in this case would settle and declare, finally and absolutely, the rights of the appellants herein and others using the same mail facilities and would put an end to any uncertainty, insecurity and controversy. The Postmaster General of the United States would know

the extent of his rights to limit and restrict mail service. See *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 57 S. Ct. 461, 81 L. Ed 617, 108 A.L.R. 1000.

Under the circumstances herein, and in view of the fact that many cases have held that the Courts have a wide discretion to be exercised in the public interest there should be an adjudication on the question of whether or not appellants herein are entitled to a declaratory judgment.

CONCLUSION

This action, having been dismissed without regard to proper procedure as required by the Federal Rules of Civil Procedure and the Local Civil Rules for the United States District Court for the District of Columbia, should be reinstated. Further, considering the facts herein, the complaint as filed sets forth a good cause of action for a declaratory judgment to settle a controversy.

Respectfully submitted,

JOHN R. FITZPATRICK,
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1406 G St., N. W.
Washington, D. C.
Attorneys for Petitioners

APPENDIX

19 Filed April 18, 1957

Order

This matter having come on for hearing on the oral motion of the defendants through their attorney the United States Attorney, to dismiss on the ground of mootness and the Court having considered the argument of counsel and the order of the Postmaster General rescinding his embargo on third class mail, and it appearing that the relief prayed for in the complaint is now rendered moot, it is this 18th day of April 1957.

Ordered that the complaint be and the same is hereby dismissed for mootness with prejudice.

JOSEPH C. McGARRAGHY
Judge

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21 No. 13,929

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

APRIL TERM, 1957

ASSOCIATED THIRD CLASS MAIL USERS, INC., and SPENCER GIFTS, INC., *Appellants*,

v.

UNITED STATES OF AMERICA and ARTHUR E. SUMMERFIELD, Postmaster General of the United States, *Appellees*.

Filed August 2, 1957

Before: Edgerton, Chief Judge, Bazelon and Burger, Circuit Judges, in Chambers.

Order

Upon consideration of appellees' motion to affirm or dismiss or in the alternative a suggestion of mootness, and of appellant's opposition, it is

ORDERED by the Court that the judgment of the District Court entered herein April 18, 1957, be, and it is hereby, affirmed.

Per Curiam

Dated: August 2, 1957

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 552

ASSOCIATED THIRD CLASS MAIL USERS, INC. AND SPENCER GIFTS, INC., PETITIONERS

v.

UNITED STATES OF AMERICA AND ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the District Court, dismissing petitioners' complaint on the ground of mootness (Pet. App. 1a), is not reported. The order of affirmance of the Court of Appeals (Pet. App. 1a–2a) is also not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 2, 1957 (Pet. App. 1a). The petition for a writ of certiorari was filed on October 15, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, in view of the Postmaster General's withdrawal of a challenged proposed curtailment of certain third class mail service, both courts below properly refused to pass on the validity of the withdrawn proposal.

STATUTE INVOLVED

The Declaratory Judgment Act, 28 U. S. C. 2201–2202, provides as follows:

28 U. S. C. 2201:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U. S. C. 2202:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

STATEMENT

Because of insufficient funds to maintain normal postal services during the final quarter of the fiscal year ending June 30, 1957, the Postmaster General issued an order on April 5, 1957, proposing curtailments of certain postal services (R. 12). Among other pro-

posed curtailments, this order stated that, unless additional funds become available, "[n]o third class mail, except certain medical items, will be accepted effective April 29, 1957" (R. 12). Five days after the issuance of this order, on April 11, 1957, the petitioners[1] filed this suit in the United States District Court for the District of Columbia to enjoin the United States and the Postmaster General from putting the proposed curtailment of third class mail service into effect (R. 5–11). The suit also sought a declaratory judgment that the proposed action was unlawful (R. 5–11).

On April 16, 1957, the Postmaster General issued a second order modifying the order of April 5, 1957 (R. 20). The later order, "effective at once," rescinded the earlier order with respect to the proposed nonacceptance of third class mail (R. 20). Thus, the proposed curtailment of third class mail service never became effective because of this rescission (on April 16, 1957) prior to the effective date of the curtailment order (April 29, 1957).

At a hearing before the District Court on April 17, 1957, the Government moved in open court to dismiss the case as moot on the basis of the Postmaster General's rescinding order of the previous day (R. 2–3). The District Court granted the motion over petitioners' objection that no answer had yet been filed to their complaint (R. 3–4, 19). The Court of Appeals affirmed in a *per curiam* order (Pet. App. 1a–2a).

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[1] Petitioner Spencer Gifts, Inc. is the holder of a third-class mail permit (R. 7), issued pursuant to 39 U. S. C. 290a–1. Petitioner Associated Third Class Mail Users, Inc. is an association whose members make extensive use of third class mail (R. 5–6).

ARGUMENT

1. The only action (or threatened action) of which petitioners complained in their complaint was the proposed curtailment of third class mail service contained in the Postmaster General's order of April 5, 1957 (R. 5–10). With the rescinding of this order on April 16, 1957, the case became moot and a justiciable controversy no longer existed, for there was nothing else to which petitioners objected. There remained only the abstract question as to whether the Postmaster General had the power, in some hypothetical circumstance, to curtail third class mail service. But neither this Court nor the lower federal courts will render an opinion "advising what the law would be upon a hypothetical state of facts." *Aetna Life Insurance Co.* v. *Haworth,* 300 U. S. 227, 241; *Muskrat* v. *United States,* 219 U. S. 346; *New York* v. *Illinois,* 274 U. S. 488. "Claims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial intervention." *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 324–325.

The speculative nature of the inquiry petitioners now urge on this Court is emphasized by their reliance on statements of Post Office Department officials at Post Office appropriation hearings to establish threatened injury (Pet. 29). Petitioners assert, on the basis of these statements, that *if* the Post Office Department does not receive an additional appropriation, and *if* the present appropriation is insufficient, and *if* the Postmaster General decides to curtail mail

services, and if he curtails service on items which petitioners wish to deposit in the mails, then they will again be threatened with injury. Cf. *Eccles* v. *Peoples Bank*, 333 U. S. 426, 432, rehearing denied, 333 U. S. 877. "The concurrence of these contingent events, necessary for injury to be realized, is too speculative to warrant anticipatory judicial determinations. Courts should avoid passing on questions of public law even short of constitutionality that are not immediately pressing." *Eccles* v. *Peoples Bank, supra* at 432.

2. Petitioners appear to have abandoned their suit for an injunction but seek to support their complaint as one for a declaratory judgment, hoping thereby to avoid the necessity of proof of threatened injury. Cf. *Public Service Commission* v. *Wycoff Co.*, 344 U. S. 237, 241. However, "[t]he requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit," *Alabama Federation of Labor* v. *McAdory*, 325 U. S. 450, 461; see also *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 325. The Declaratory Judgment Act in terms applies only in "a case of actual controversy;" 28 U. S. C. 2201, *supra*, p. 2, and in such a case provides a new procedural remedy only; it has not broadened the courts' jurisdiction, nor altered the requirements of justiciability. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667; *Alabama Federation of Labor* v. *McAdory, supra*. That petitioners now seek a declaratory judgment does not alter

the fact that the complaint presents only "hypothetical controversies which may never become real" (*Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 443), and brings to the courts a "dispute [that] has not matured to a point where we can see what, if any, concrete controversy will develop" (*Public Service Commission* v. *Wycoff Co.*, 344 U. S. 237, 245). Less than a month ago, this Court applied these same principles in ordering dismissal on the ground of mootness of a similar case in which, as here, the challenged administrative order had been withdrawn. *Association of Lithuanian Workers* v. *Brownell*, No. 295, this Term, decided October 28, 1957. See also *Arkansas & Louisiana Missouri Ry. Co.* v. *Amarillo-Borger Express, Inc.*, 352 U. S. 1028; cf. *United Public Workers* v. *Mitchell*, 330 U. S. 75.[2]

[2] Petitioners' objection to the fact that the Government's motion was made orally is unsound. The motion was made in open court at a hearing attended by counsel for all parties. Rule 7 (b), F. R. Civ. P., provides that "An application to the court for an order shall be by motion which, *unless made during a hearing or trial*, shall be made in writing * * *." (Emphasis added.) No objection was made to the form of the motion at that time, and counsel indicated to the court that petitioners intended to press for a declaratory judgment despite the withdrawal of the order. The court was thus made aware of petitioners' position. (R. 2–4). For that reason, the failure on the part of the Government to submit its motion to dismiss in written form certainly cannot be said to have prejudiced or affected any of petitioners' substantial rights. Rule 61, F. R. Civ. P., directs the district courts to "disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
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Assistant Attorney General.
MORTON HOLLANDER,
HERSHEL SHANKS,
Attorneys.

NOVEMBER 1957.

U. S. GOVERNMENT PRINTING OFFICE 1957